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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

IN RE SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE HONORABLE WILLIAM C. CANBY, JR., AND HARRY PREGERSON, CIRCUIT JUDGES, AND STEPHEN V. WILSON, DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

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QUESTION PRESENTED FOR REVIEW

Whether this Court should issue a writ of mandamus to the United States Court of Appeals for the Ninth Circuit to compel that court to resolve the claims remaining undecided after this Court's opinion in *Lewis v. Jeffers*,[1] when the circuit court has ignored this Court's command in *In Re Blodgette*[2] to "take all steps necessary to ensure a prompt resolution" of this capital case and has considered Jeffers' appeal for nearly 3 years without deciding it?

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1. 110 S. Ct. 3092, 111 L. Ed. 2d 602 (1990).

2. 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992).

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Petitioners respectfully request that, pursuant to 28 U.S.C. § 1651(a), the All Writs Act, this Court issue a Writ of Mandamus in *Jeffers v. Lewis*, No. 86-1840, to compel the United States Court of Appeals for the Ninth Circuit, the Honorable William C. Canby, Jr., and Harry Pregerson, Circuit Judges, and Stephen V. Wilson, District Judge of the Central District of California, to decide, within a time certain, the claims remaining on appeal after this Court's opinion in *Lewis v. Jeffers*.

I. ORDERS AND OPINIONS BELOW

On June 27, **1990**, this Court remanded this case to the United States Court of Appeals for the Ninth Circuit for proceeding consistent with the opinion in *Lewis v. Jeffers*, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). On August 31, **1992**, a divided panel of the Ninth Circuit issued an opinion vacating the inmate's death sentence on an issue not raised by the inmate in the *habeas corpus* petition or in the briefs. *Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992). On September 12, 1992, the State of Arizona filed a motion for rehearing, with a suggestion for rehearing en banc. (Appendix A.) On March 19, 1993, the State filed its second request for ruling on the motion for rehearing. (Appendix B.) On March 31, 1993, the clerk of the court notified counsel that the panel would rule on the motion by "the end of April." (Appendix C.) As of the date of the filing of this petition, June 18, 1993, the panel had not issued a ruling on the motion for rehearing.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1651(a) and United States Supreme Court Rule 20.1. This Court has jurisdiction over any decision of the Court of Appeals on Jeffers' appeal pursuant to 28 U.S.C. § 1254.

III. STATEMENT OF THE CASE

Jeffers, an inmate in the Arizona State Prison sentenced to death, filed a petition for writ of habeas corpus in the United States District Court in **December 1983**. On **February 4, 1986**, the district court dismissed the petition. *Jeffers v. Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986). In his opening brief in the United States Court of Appeals for the Ninth Circuit, Jeffers raised five claims that his convictions were improper, and eight

claims that his death sentence was improperly imposed. On November 9, 1987, a three member panel of the circuit court, composed of Circuit Court Judges William C. Canby, Jr., and Harry Pregerson, and District Court Judge Stephen V. Wilson, sitting by designation, rejected all of Jeffers' attacks on his conviction. *Jeffers v. Ricketts*, 832 F.2d 476, 479–81 (9th Cir. 1987). The panel also rejected Jeffers' claim that he was denied an impartial sentencing tribunal. *Id.* at 481–82. However, two members of the panel vacated Jeffers' death sentence on the ground that the "especially heinous or depraved" aggravating circumstance found by the state court to exist in his case, while sufficiently narrow, could not be constitutionally applied to Jeffers "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." *Id.* at 486. The panel declined to consider Jeffers' remaining sentencing-related claims. *Id.* at 486. On April 14, 1989, the circuit court denied the State of Arizona's motion for rehearing and suggestion for rehearing en banc.

The State then filed a petition for writ of certiorari asking this Court to review the circuit court's decision that the "especially heinous or depraved" circumstance could not be constitutionally applied to Jeffers. On **October 10, 1989**, this Court granted the State's petition, and on **June 27, 1990**, concluded that the state supreme court had adopted a sufficiently narrow construction of the "especially heinous or depraved" circumstance, and that the circumstance had been constitutionally applied in Jeffers' case. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3104, 111 L. Ed. 2d 606, 624–25 (1990). This Court vacated the circuit court's judgment and remanded the case to that court for proceedings consistent with its opinion. *Id.*

On **October 1, 1990**, the circuit court ordered supplemental briefs on the sentencing-related claims that Jeffers had previously raised in the circuit

court that were not resolved by the circuit court's original decision nor by this Court's opinion in *Lewis v. Jeffers*. (Appendix D.) The issues remaining for consideration were as follows: (1) whether the trial court considered and made appropriate findings regarding all the mitigating circumstances that Jeffers proffered; (2) whether the Arizona Supreme Court's modification of the trial court's findings regarding aggravating circumstances required resentencing; (3) whether Jeffers had an "equal protection" right to a jury determination of aggravating and mitigating circumstances; (4) whether Arizona's capital sentencing scheme is unconstitutional because the prosecutor does not have to make a separate showing that the death sentence is appropriate; (5) whether the district court correctly refused to hold an evidentiary hearing on Jeffers' claim that the Arizona capital sentencing scheme was discriminatory; (6) whether the offer of pretrial plea agreements precluded the imposition of the death sentence. The State submitted its supplemental answering brief on **January 28, 1991**. The circuit court heard oral argument on the claims on **July 24, 1991**.

On **January 29, 1992**, Petitioners filed a Request for Ruling in the circuit court, reminding that court of this Court's command to promptly rule on capital cases before it. (Appendix E.) The circuit court took no action regarding the State's request or Jeffers' appeal, so on August 3, 1992, the State filed a petition for writ of mandamus with this Court. *In re Lewis*, No. 92-289. On August 31, 1993, while the State's mandamus petition was pending in this Court, a divided panel issued an opinion, setting aside Jeffers' death sentence on an issue not raised by the inmate in state court, before the district court, or in the briefs filed with the panel. *Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992). On September 14, 1992, the State filed pursuant to Rules 35 and 40 of the Federal Rules of

Appellate Procedure, a petition for rehearing with suggestion for rehearing en banc. (Appendix A.) After waiting 60 days, the State filed its first request for ruling. (Appendix F.) In response, the panel ordered Jeffers to file a response to the State's motion. On December 15, 1992, the inmate filed his response to the petition for rehearing/suggestion for rehearing en banc. The State waited for over 90 days after the response was filed, and again filed a request for ruling. (Appendix B.) On March 31, 1993, the clerk of the court notified counsel that the panel would rule on the motion by "the end of April." (Appendix C.) As of the date of the filing of this petition, June 18, 1993, the panel had not issued a ruling on the motion for rehearing.

IV. SUMMARY OF ARGUMENT

Because the federal courts have granted a stay of execution in this case, they have a duty to take all steps necessary to ensure a prompt resolution of the matter. Mandamus is appropriate to compel an inferior court to exercise its authority when it has a duty to do so. On June 27, 1990, this Court vacated the Ninth Circuit's decision and remanded the case for that court to resolve the remaining issues. As of June 1993 over 3 years later, that court has still not done so. Because the Ninth Circuit has failed in its duty to take all steps necessary to ensure a prompt resolution of the matter, mandamus is appropriate for this Court to compel the Ninth Circuit to resolve the remaining issues as soon as possible.

V. REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COMPELLING IT TO DECIDE JEFFERS' APPEAL WITHIN A TIME CERTAIN BECAUSE THAT COURT HAS IGNORED THIS COURT'S COMMAND TO RESOLVE CAPITAL CASES PROMPTLY.

Because this is a capital case and because the Ninth Circuit Court of Appeals has not ruled in a sufficiently prompt manner, this Court should issue a Writ of Mandamus to the Ninth Circuit to require it to rule on Jeffers' appeal within a time certain. Mandamus is appropriate to compel an inferior court to exercise its authority when it has a duty to do so. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Although the time taken to issue a decision is within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has "clearly abused its discretion." *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84–85 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957).

The circuit court has clearly abused its discretion in delaying issuing a decision in this capital case. This Court explicitly held in *In re Blodgette*, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992), that such delay would not be tolerated:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty *to take all steps necessary to ensure a prompt resolution of the matter*, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

112 S. Ct. at 676, 116 L. Ed. 2d at 676 (emphasis added). The circuit court has not "taken all steps necessary to ensure a prompt resolution" of Jeffers' appeal. Three years have passed since this Court remanded Jeffers' appeal to the circuit court with no final resolution. Since **September 14,**

1992, 9 months ago, the circuit court has had the State's motion for rehearing presenting the law and its application to the issues remaining to be decided. On **November 16, 1992 and March 19, 1993**, the State of Arizona notified the circuit court by motion of this Court's command in *Blodgette*, and requested that the circuit court promptly rule on the remaining issues. (Appendix B & F.) The circuit court did not act upon Arizona's motion, and still has not issued a decision. The circuit court is ignoring this Court's direction in *Blodgette*, and a Writ of Mandamus to that court is essential to ensure compliance with the requirement in *Blodgette*.

The circuit court's dilatory inaction harms this Court, the State of Arizona, and the American system of justice. This Court is harmed because the circuit court's inaction deprives this Court of its power to review the *Jeffers* case by way of certiorari. This Court has stated the following regarding a lower court's efforts to defeat a superior court's appellate review:

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins. Co., 437 U.S. at 661–62 (quoting *Knickerbocker Ins. Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872)). This Court is deprived of its appellate jurisdiction as long as the circuit delays deciding Jeffers' appeal.

The State of Arizona is also harmed because it has been deprived of its sovereign power to enforce its criminal laws. This Court recognized this harm in *Blodgette*:

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe

> prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McCleskey v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

112 S. Ct. at 676, 116 L. Ed. 2d at 674 (citation omitted). As with Washington in *Blodgette*, Arizona has suffered a severe diminution of its sovereign power:

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but *the power of a state to pass laws means little if the state cannot enforce them.*

McCleskey v. Zant, 111 S. Ct. 1454, 1469, 113 L. Ed. 2d 517, 543 (1991) (emphasis added). The diminution of sovereignty is even greater for Arizona in this case, because the federal courts have prevented Arizona from enforcing its criminal laws against Jeffers since **December 1983**, almost 10 years. A result not anticipated when this Court remanded the matter 3 years ago.

Finally, the American judicial system is harmed by the circuit court's inaction. The circuit court's apparent endless search for epistemological certainty on issues before issuing a decision on an appeal damages the very justice the circuit court seeks:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 111 S. Ct. at 1469, 113 L. Ed. 2d at 543, *quoting* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963). A court immobilized in

its search for justice provides none. The circuit court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 403 (1821) (emphasis added). Ever-delayed justice is no justice at all.

The Ninth Circuit Court of Appeals has ignored this Court's plain command to promptly resolve capital cases such as Jeffers' appeal. Such inaction, whether unintended or deliberate, harms this Court, Arizona, and the American system of justice. Arizona has attempted to bring this unreasonable delay to the circuit court's attention, but to no avail. Arizona has no other available course of action or remedy but to seek a Writ of Mandamus from this Court to the circuit court. Therefore, the State of Arizona respectfully request that this Court issue a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit to compel that court to issue a decision in Jeffers' appeal within a time certain.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court issue a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, the Honorable Circuit Judges William C. Canby, Jr., and Harry Pregerson, and District Court Judge Stephen V. Wilson.

Respectfully submitted,

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